

IN THE FEDERAL SHARIAT COURT

(Appellate Jurisdiction)

PRESENT

**MR. JUSTISCE SYED AFZAL HAIDER
MR. JUSTICE MUHAMMAD AFZAL SOOMRO**

CRIMINAL APPEAL NO. 120/I OF 2008

The State

Appellant

Versus

Faisal Munir son of Munir Hussain,
r/o Zeeshan colony, Jalalpur Jattan,
Tehsil & District Gujrat ...

Respondent

Counsel for State/appellant ...

Raja Shahid Mehmood Abbasi
Deputy Prosecutor General

Counsel for appellant ...

Mr. Zafar Abbas Mir,
Advocate

FIR No. Date &
Police Station ...

272, Dated 22.07.2003
Saddar Jalalpur Jattan, Gujrat

Date of judgment of
trial court ...

25.08.2008

Dates of Institution ...

18.11.2008

Date of hearing of Appeal ...

01.04.2009

Date of decision by
Federal Shariat Court ...

01.04.2009

JUDGMENT

SYED AFZAL HAIDER, Judge.- This appeal has been filed by the State challenging the judgment dated 25.08.2008 delivered by learned Sessions Judge, Gujrat whereby the learned trial court acquitted Faisal Munir accused from charges under section 12 of Offence of Zina (Enforcement of Hudood) Ordinance, 1979 as well as section 377 of Pakistan Penal Code.

2. The crime report was registered as FIR. No. 272 with Police Station, Saddar Jalalpur Jattan District Gujrat on the written complaint Ex.PA of Muhammad Farhan, victim appearing at the trial as P.W.1.

3. The brief facts of the case as disclosed in the crime report are that victim Muhammad Farhan resident of Mohallah Gujrati was a student of 10th Class. On 10.06.2003 at about 3.00.p.m. Faisal Munir accused met him and his friend Nazakat Ali in the street and invited him to visit Shahbazpur on which he alongwith Nazakat Ali went to Adda Tam Tam and hired a motorcycle with the reference of Faisal Munir as suggested by him. All the three went to Jalalpur Jattan on the motorcycle. From there the

accused took them to Shahbazpur and then to Dhilu Sharqi where the accused Faisal Munir called one Luqman alias Mani and had some talk with him at some distance. After sometime Luqman brought two glasses of soft drink which was consumed by both of them. Accused asked Nazakat Ali to fetch cigarettes and after that Faisal Munir and Luqman took him to the poultry farm of Luqman. The victim felt drowsy and then he reclined on the cot. The accused Faisal Munir and Luqman put off his trouser forcibly and attempted sodomy with him. The complainant resisted and whereupon he was slapped. Thereafter Faisal Munir committed sodomy with him. In the meantime Nazakat Ali, P.W.2 and Luqman PO arrived there. Nazakat Ali rescued the victim from the accused. The victim was then dropped by the accused in Jalalpur Tattan near Akram Hospital. The victim on reaching home narrated the entire episode to his father. In the meantime the accused party made efforts to seek pardon. Compromise could not be effected whereafter Muhammad Farhan moved an application with the object of bringing the criminal law into motion.

4. The application was entertained by local police and as stated above crime report was registered against accused where after police investigation ensued. The investigation of the case was conducted firstly by Muhammad Akbar Baig, S.I. who appeared at the trial as P.W.6. He visited the place of occurrence, inspected the same and prepared rough sketch plan Ex.PE. Accused Luqman joined investigation before him but the Investigating Officer found him innocent. He searched for accused Faisal Munir but he could not be arrested. The witness was transferred. Thereafter the investigation was entrusted to Muhammad Anwar, S.I.P.W.7 who conducted raids to arrest the accused and on 16.10.2003 Faisal Munir accused was arrested by him. The accused was sent for medical examination to medical examination to verify his potency. He found the accused guilty during investigation. After conclusion of police investigation a report under section 173 of the Code of Criminal Procedure was submitted in the court requiring the accused to face trial.

5. The trial court on receipt of the report framed charge on 06.07.2005 against the accused under section 12 of Offence of Zina

(Enforcement of Hudood) Ordinance, 1979 as well as section 377 of Pakistan Penal Code. The accused pleaded innocence and claimed to be tried.

6. The prosecution in order to prove its case produced seven witnesses at the trial. The gist of deposition of the witnesses for the prosecution is as follows:-

- i. Muhammad Farhan, victim appeared as P.W.1. He reiterated the facts recorded in the crime report.
- ii. Nazakat Ali, an eye witness of the occurrence appeared as PW2 and corroborated the statement of Muhammad Farhan P.W.1.
- iii. Sabir Hussain Head Constable appeared as P.W.3. He stated that Muhammad Akbar Baig, S.I. handed over to him one sealed phial and a sealed envelope for keeping the same in malkhana in safe custody which was later on handed over to Muhammad Siddique, Constable No.62 on 20.06.2003 for onward transmission to the Office of the Chemical Examiner, Lahore.
- iv. Muhammad Siddique Constable No.62 appeared at the trial as PW 4. He stated that after receipt of sealed phial and one sealed envelope, he deposited the same to the Office of the Chemical Examiner intact on the same day.

- v. Dr. Muhammad Yousaf Dar appeared as P.W.5. He deposed that on 19.06.2003 he medically examined Muhammad Farhan aged 19 years and issued medico legal report Ex.PB. The medical opinion on examination revealed that there was "no injury/signs of violence." The opinion was that "the possibility of commission of sodomy cannot be ruled out." There were two lacerated wounds with skin burnt on the anterior aspect of left forearm and anterior aspect of right forearm. The doctor further stated that according to the report of the Chemical Examiner "the swabs sent for analysis were found not to be stained with semen."
- vi. Muhammad Akbar Baig, S.I. and Muhammad Anwar, S.I. respectively appeared at the trial as P.Ws. 6 and 7 and deposed about the steps taken by them during investigation conducted in this case. The detail of investigation of both the police officers has already been noted in an earlier paragraph.

7. The trial court after close of the prosecution evidence recorded statement of accused under section 342 of the Code of Criminal Procedure wherein he claimed innocence and stated that case against him was on account of political rivalry. The story of the occurrence according to him was concocted with the connivance of the doctor. The accused did not opt to make statement on oath under section 340(2) of the Code of Criminal

Procedure. However the accused produced Munir Hussain and Muhammad Ayub as D.Ws 1 and 2. Both of them supported the version of the accused Faisal Munir and stated that the case against the accused was due to previous enmity when a case of murder was registered against him by the rival group. He claimed having been acquitted in that false murder case.

8. The learned trial court after close of the prosecution evidence assessed the evidence of the prosecution and defence evidence in the height of the arguments advanced by the adversaries and survey of precedents from different aspects found that the prosecution was "neither worthy of credit nor confidence inspiring and as such while extending benefit of doubt Faisal Munir is hereby acquitted of both heads of charges." As regards Luqman, the proclaimed offender, it was decided to try him as and when he was arrested. The verdict of not guilty was announced on 25.08.2008 by the learned trial court.

9. The State through Deputy Prosecutor General has moved an appeal under section 417 of the Code of Criminal Procedure against the judgment dated 25.08.2008 delivered by learned Sessions Judge Gujrat by

which the respondent was acquitted. The grounds of appeal are very short; firstly that the judgment is against law and facts of the case and secondly the prosecution has proved its case to the hilt and the acquittal has resulted in miscarriage of justice.

10. The file of this case has been seen. The evidence of witnesses or the prosecution and defence as well the statement of accused in the form of answers to different questions has also been perused. The relevant portions of the judgment have been scanned. Arguments of learned counsel for the State and learned counsel for the respondent have also been heard.

11. At the outset we made it clear to the learned Deputy Prosecutor General that parameters for dealing with an appeal against acquittal were distinct from the principles at work while adjudicating upon an appeal against conviction. All acquittals are honourable. An acquittal carries weight because the presumption of innocence attached with the accused no more remains a presumption after acquittal. It in fact attains judicial recognition after passing through the tartans, protracted and, painstaking steps of the trial. During the progress of the trial the presiding

officer has the exclusive opportunity to watch the conduct of trial. The accused, as a matter of right and not the complainant, is entitled to benefit of doubt. A genuine doubt even on one crucial point can secure acquittal of the accused. There is unanimity of judicial opinion that perversity, arbitrations or capriciousness in the judgment under question must be established before reversal of acquittal could be claimed. The appellate Courts are loath to interfere unless it is established that i/ misreading of evidence or ii/ lack of consideration of material evidence or iii/ reception of evidence illegally or iv/ violation of legal provisions or v/ jurisdictional defects a vi/ reliance placed on matters extraneous to the record or vii/ material witnesses for the prosecution were not recorded or viii/ the acquittal order on the face of it is contradictory or ix/ the order of acquittal was passed with out hearing the prosecution or x/ the principles governing appreciation of evidence have been violated or xi/ the acquittal judgment was based upon surmises, suppositions and/or conjectures or xii/ acquittal is based upon reasons which do not appeal to a reasonable mind or xiii/ for

that purpose, there are gross mis-statements appearing in the judgment under review.

12. The acquittal order of the lower court is entitled to respect and it cannot be interfered with solely on the reason that another opinion could be possible on the given set of evidence and circumstances. However instances are not lacking where the appellate courts have reversed the finding of acquittal. A judgment can be faulty and defective.

13. The specific provision of appeal in legal codes is a pointer to this very fact that a judge can go wrong, but it must be shown that a mistake of the magnitude of miscarriage of justice has been committed.

14. The learned counsel for the State urged that there are injuries on the arms of the victim as his skin was burnt with burning circumstances.

It was therefore contended that the failure of the learned trial court to award conviction and sentence under section 337 J of the Pakistan Penal Code amounted to gross miscarriage of justice. Learned Deputy Prosecutor General, on court question failed to refer to even one sentence in the

prosecution evidence that the accused applied burning cigarettes on the body of the victim. In so far section 337 J of the Penal Code is concerned, it is relatable to administering poisoning. There is of course an allegation that the victim was administered some intoxicant. but the allegation of serving the sharbat was against Luqman and not the appellant. Moreover Nazakat Ali had also consumed the same sharbat but he does not allege having experience drowsiness as a result of the soft drink. But there is no expert or other dependable evidence to show that the accused was hit by the mischief of section 337 J of the Penal Code.

15. Learned Deputy Prosecutor General then submitted that the act of sodomy has been duly corroborated by medical evidence. However, medical evidence was scanned and the learned counsel for the State was not able to substantiate his contention.

16. The learned counsel for the State next contended that allegation of sodomy was corroborated by the evidence of Nazakat Ali PW.2 The learned counsel was unable to comment on the reply given by PW.2 to a question posed to him in the cross-examination where he stated:-

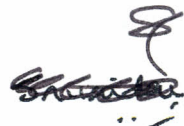
“I have not seen Faisal Munir committing sodomy with Farhan complainant.”

17. The learned Deputy Prosecutor General then came out with the argument that the co-accused have been declared absconders so it should be presumed that the appellant is guilty. This argument needs no comment. It was also contended, regretfully, that the defence plea was not plausible and consequently the acquittal order should be reversed. I do not know since when the prosecution has been relieved of the obligation of proving its case beyond reasonable doubt. In our criminal jurisdiction the onus of bringing the charge home to the accused lies squarely upon the prosecution.

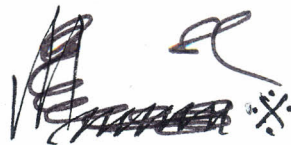
18. The impugned judgment is well reasoned. Each and every witness has been discussed. All the precedents quoted by the parties have been analysed. The arguments of the adversaries advanced before him have been duly considered. The testimony of the eye witness has also been assessed. Any defect worth the name that would entail reversal of acquittal judgment has not been pointed out by learned Deputy Prosecutor General.

It has not been shown that the various principles, mentioned in paragraph 11 of this judgment, relating to adjudication of appeal against acquittal, do not have the legal or judicial sanction.

19. In this view of the matter Criminal Appeal No.120/I of 2008, filed on behalf of the State against respondent Faisal Munir under section 417 of the Criminal Procedure Code to challenge impugned judgment delivered by learned Sessions Judge, Gujrat dated 25.08.2008 whereby the respondent was acquitted, is dismissed for reasons recorded in this judgment.

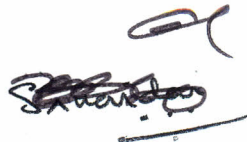


JUSTICE SYED AFZAL HAIDER



JUSTICE MUHAMMAD AFZAL SOOMRO

Islamabad the 1st April, 2009
Mujeeb-ur-Rehman/*



Fit for reporting